

# Teaching and Learning Islamic Law in a Globalized World: Some Reflections and Perspectives

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This paper is an attempt to highlight some questions and issues inherent in the conceptualisation, development, and delivery of Islamic law curricula in diverse jurisdictions and in an increasingly globalized academic environment. There exist significant challenges, both conceptual and methodological, for Islamic law teaching in Muslim and non-Muslim jurisdictions. In Muslim jurisdictions, it is imperative to move beyond an exclusively doctrinal, literal, and inflexible approach to teaching and learning Islamic law. To achieve this, instructors need to consciously evaluate the content of their courses as well as their classroom techniques. However, that approach presents somewhat of a dilemma: On the one hand Muslim academics endorse the dynamic and varied interpretations enriching the Islamic legal tradition by different schools of juristic thought. On the other hand, in reality, this diversity and dynamism does not translate to a tolerant intellectual environment in the academy and indeed

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in life in general. In this article, I draw upon my own experiences teaching and researching Islamic law in both Muslim and non-Muslim jurisdictions, as well as on the views and opinions of Islamic law teachers in a number of jurisdictions, including Pakistan, Malaysia, Nigeria, South Africa, the United Kingdom, Continental Europe, and the United States. This paper has grown organically over a number of years through feedback and comments from students, colleagues, and participants at various workshops and conferences as part of an Islamic Law Curriculum Development Project. I suggest adopting a “law in context” approach to appreciate the inherent complexities and intricacies of Islamic law. I argue for adopting a rigorous methodology in the teaching and learning process by encouraging a critical engagement with the primary and secondary sources of the Islamic legal tradition. Simultaneously, this paper emphasizes how Islamic law teaching is “different” or “special” compared to subjects where “the law” consists of clearly defined articles of statute law. Finally, this paper advances the argument that teaching Islamic law offers the opportunity for imparting important lawyering skills, including developing coherent arguments from varying source materials, understanding the plurality of views and opinions, analyzing legal norms, and sifting and extrapolating the legal from the moral, ethical and religious injunctions. A common theme running through this paper is the consciousness that law making based on a divine text (as is the case in Islamic law), is a human and not divine act and therefore open to challenge, debate and change. Contested and controversial as this approach is, it must form an integral component of any course on Islamic law.

Having taught various aspects of Islamic law for twenty-five years in a Muslim jurisdiction, I encountered some interesting challenges when I stepped out of my sheltered niche of Peshawar University in the Khyber Pukhtunkhwa Province<sup>1</sup> of Pakistan and into international academic settings. Devising guest lectures, short courses, conferences and workshops, and undergraduate and postgraduate modules at a number of institutions outside the country of my birth put me on a steep learning and discovery curve. I found myself in turn surprised, challenged, fascinated, and enthused by significant differences underlying the conceptual, methodological, and pedagogical approaches employed in a university located in a country with a predominantly Muslim population and institutions in non-Muslim countries including the United Kingdom, Norway, Denmark, and the United States.

Like every discipline, Islamic law raises conceptual, methodological and pedagogical issues in terms of its teaching and learning processes. This paper seeks to identify and analyze some of these, with the proviso that issues raised here are not exhaustive but merely indicative of questions one may anticipate in the teaching and learning of Islamic law.

1. This province formerly known as the NorthWest Frontier Province (NWFP) was renamed as Khyber Pukhtoonkhwa through the recently enacted Eighteenth Constitutional Amendment adopted by the Pakistan Parliament in 2010.

### **The Islamic Legal Tradition: Key Concepts and Terminology**

One of the core concepts in the study of Islamic law is the *Shari'a*,<sup>2</sup> both in terms of its centrality to the understanding of the Islamic legal tradition as well as the varying definitions ascribed to it. *Shari'a* is the overarching umbrella of rules, regulations, values, and normative framework covering all aspects and spheres of life for Muslims. It constitutes the divine injunctions of God (the *Qur'an*), divinely-inspired *Sunna* (words and deeds of the Prophet Muhammad recorded as *Hadith*) as well as the human articulation and understanding of these sources.<sup>3</sup> *Shari'a* is therefore not restricted to legal rules; it is informed by the divine and divinely inspired text, but not entirely so, and not static and immutable but dynamic and evolutionary in nature.

Rahman states that:

At the very root of the Muslim conception of law lies the idea that law is inherently and essentially religious. That is why, from the beginning of Islamic history, law has been regarded as flowing from or being part of the concept of *Shari'a* (the divinely ordained pattern of human conduct).<sup>4</sup>

Kamali too reiterates the divine and religious nature of *Shari'a* declaring that:

Notwithstanding the fact that human reason has always played an important role in the development of Shariah...the Shariah itself is primarily founded on divine revelations.<sup>5</sup>

An-Naim is of the view that:

The term *Shari'a* refers to the general normative system of Islam as historically understood and developed by Muslim jurists, especially during the first three centuries of Islam—the eighth to tenth centuries CE. In this commonly used sense, *Shari'a* includes a much broader set of principles and norms than legal subject matter as such.<sup>6</sup>

2. Readers will note that the term *Shari'a* is spelled differently by different authors (*Shariah*, *Sharia't*). Unless quoting an author who may have spelled the word differently, this paper will use *Shari'a* as the standard spelling.
3. See Abdur Rahim, *Muhammadian Jurisprudence* (Mansoor Book House 1995); Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3d ed. Islamic Texts Society 2003); Tariq Ramadan, *To Be a European Muslim* (The Islamic Foundation 1999); A. R. I. Doi, *Shari'ah: The Islamic Law* (Ta Ha Pub. 1984); Asaf A. A. Fyzee, *Outlines of Muhammadian Law* (4th ed. Oxford Univ. Press 1974).
4. Fazlur Rahman, *Islam* (3d ed. Univ. of Chicago Press 1979).
5. Kamali, *supra* note 3, at xix.
6. Abdullahi Ahmed An-Naim (ed.), *Islamic Family Law in a Changing World: A Global Resource Book 1-2* (Zed Press 2002).

*Shari'a* thus is more than black letter law and legal principles. It encompasses social, moral and ethical normativities affecting human lives.<sup>7</sup> I suggest elsewhere that the phrase “principles of Islamic law” more appropriately captures the true breadth of this concept, as opposed to terming it immutable, unchangeable, and divine law, whereas the legal component of *Shari'a* is the “Islamic legal tradition” or “Islamic law” as it is commonly termed.<sup>8</sup>

The Islamic legal tradition includes primary sources such as the *Qur'an*<sup>9</sup> and *Sunna*,<sup>10</sup> and secondary sources, including *Ijma* (consensus of opinion)<sup>11</sup> and *Qiyas* (analogical deduction).<sup>12</sup> In addition, the range of juristic techniques includes *Ijtihad* (literally, striving hard and strenuously), which denotes exercising independent juristic reasoning to provide answers when the *Qur'an* and *Sunna* are silent on a particular issue.<sup>13</sup> *Taqlid* (duty to follow) is considered by most students of Islamic law as mere “imitation,” to emulate or copy. As a term of jurisprudence, *taqlid* may be used in the context of accepting someone's intellectual authority.<sup>14</sup> While inhibiting independent legal formulations, *taqlid* allowed later jurists a choice from among variant views recorded in authoritative texts.<sup>15</sup>

7. *Id.* at 68; A. Allot, *The Limits of Law* (Butterworths 1980); Fyzee, *supra* note 4; David Pearl & W. Menski, *Muslim Family Law* (3d ed. Sweet & Maxwell 1998).
8. I have developed the idea of the “operative” Islamic law as opposed to *Shari'a* in my book: Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Kluwer Law Int'l. 2000).
9. The *Qur'an* is believed by Muslims to be the word of God and was revealed to the Prophet Muhammad through the Angel Gabriel over a period of 22 years, 2 months and 22 days. It is divided into 114 chapters and has a total of 6,666 verses and 30 sections.
10. *Sunna*, meaning the words and deeds of the Prophet Muhammad (and also known as traditions), are compiled as *Hadith* (singular) and *Ahadith* (plural). A tradition or *Hadith* is composed of the *matn* (text) of the tradition and the *isnad* (chain of transmitters).
11. It is defined by Rahim as “agreement among the Muslim jurists in a particular age on a question of law.” Rahim, *supra* note 3, at 97. “*Ijma* is defined as the unanimous agreement of the *mujtahidun* of the Muslim community of any period following the demise of the Prophet Muhammad on any matter.” Kamali, *supra* note 3, at 230.
12. As a source of law *Qiyas* comes into operation in matters not covered by an express text of the *Qur'an* and *Sunna* nor dealt with by *Ijma*. The law deduced by application of what has already been laid down by the three sources is *Qiyas*. Rahim, *supra* note 3, at 117.
13. A person qualified to undertake *Ijtihad* is known as a *Mujtahid* and there are specific qualifications for a person to be so acknowledged.
14. Rahim, *supra* note 3, at 144-145; Noel James Coulson, *A History of Islamic Law* 80-81 (Edinburgh Univ. Press 1994).
15. Coulson, *supra* note 14, at 182.

Similarly, by applying the process or technique of *ikhtilaf*, or the “unity in diversity” doctrine, jurists of the various schools of thought as well as practitioners arrived at positions that were representative of diverse viewpoints.<sup>16</sup>

*Takhayyur* means a process of selection and is a term of jurisprudence used to consider possible alternatives from a range of juristic opinions on a particular point of law, with the intention to apply the least restrictive legal principles to issues arising. *Takhayyur* has been of enormous significance in developing a number of women friendly codes of family laws in Muslim jurisdictions.<sup>17</sup>

*Talfiq*, translated literally as “patchwork,” implies the process whereby Muslim jurists constructed legal rules by the combination and fusion of opinions derived from different schools of thought on a particular issue.<sup>18</sup>

*Maslaha* (the public good or in the public interest) or *masalihul-mursala wa’listislah* is a doctrine propounded by Imam Malik who allowed “a deduction of law to be based on general considerations of the public good.”<sup>19</sup> There is evidence that *qadis* (judges) and jurists in Muslim history have employed this concept to override problems arising out of adherence to strict doctrine enshrined in the classical legal texts. *Darura* (necessity/duress) is a technique applied where it becomes imperative to make prohibited things and situations permissible. Last but certainly not least in the catalogue of juristic techniques is custom or ‘*urf*’ as a source of law, also termed *ta’amu*l or ‘*adat*.<sup>20</sup>

16. *Id.* at 86. This diversity is described by Coulson as being “as varied as the colors of the rainbow.”

17. For example, regarding circumstances where a married Muslim woman may seek dissolution of her marriage, the Hanafi School is restrictive whereas the Maliki is flexible and allows a wife to seek dissolution on the grounds of her husband’s cruelty. This was incorporated in a number of personal status laws in the Muslim world. Likewise, the Hanbali doctrine of abiding by stipulations (based on the *hadith* of the Prophet Muhammad) led this school of thought to declare that the marriage contract could stipulate the husband’s monogamy, the wife could choose the place of residence, and so on. Examples of *Takhayyur* include the Dissolution of Muslim Marriages Act 1939, the Moroccan Code of Personal Status 1858, Jordanian Law of Family Rights 1951, Syrian Law of Personal Rights 1953, the Ottoman Law of Family Rights 1917, and the latest, Moroccan Family Code (Moudawana) 2004, among others.

18. An interesting example of *talfiq* is the Indian landmark case of Muhammad Ibrahim v. Gulam Ahmed (1864), where a girl brought up as a Shafi’i married without her father’s consent. When the case came up in court, she declared that she had chosen to change her school of juristic thought to the Hanafi School because Hanafi law allows an adult Muslim woman to marry without the consent of her guardian.

19. Rahim, *supra* note 3, at 140; see also Coulson, *supra* note 14, at 144.

20. At times controversial, this source of law and juristic technique plays an important role in the growth of the Islamic legal tradition as it speaks to the commonly held beliefs and convictions of communities. Thus some communities of South Asia relied upon ‘*urf*’ to interpret Muslim laws of inheritance.

Students of Islamic law are also called upon to appreciate the difference between *Shari'a*, *fiqh*, and *usul-ul-fiqh*. According to Kamali:

The main difference between *fiqh* and *usul-ul-fiqh* is that the former is concerned with the knowledge of the detailed rules of Islamic law in its various branches, and the latter with the methods that are applied in the deduction of such rules from their sources. *Fiqh*, in other words, is the law itself, whereas *usul-ul-fiqh* is the methodology of the law.<sup>21</sup>

### The Definitional/Naming Dilemmas

Bearing in mind the vast array of terms and terminology employed in describing the Islamic legal tradition and its various branches, as well as the limitations of translating these from Arabic to English, one of the first issues to grapple with in constructing a course on the Islamic legal tradition relates to appropriate title and terminology. Do we describe it as *Shari'a* law, Muslim law, Islamic law, or Muhammadan law (recalling the colonial description)? Each of these course titles has implications for scholarship on the subject as well as content, pedagogy and delivery of the curriculum because the title also delineates its ideological underpinnings. A course entitled *Shari'a* Law for instance implies that *Shari'a* constitutes law in the sense of legally enforceable rules and akin to black letter law. But as we have noted above, law is only a component of *Shari'a*, which covers all aspects of human life, and such a course title would be misleading. Secondly, and more importantly, *Shari'a* law reflects the position that it is an all-encompassing normative framework of divine rules and hence immutable and unchangeable through human intellectual endeavour. This approach, of assuming *Shari'a* to comprise solely divine and unchangeable rules, though not necessarily inherent in the title, is prominent in Islamic law teaching in Muslim jurisdictions. In non-Muslim jurisdictions, however, the extent to which a course with this title and content fits within a law curriculum and, whether a better fit might be a program based in a department of theology, religious studies, or Islamic studies, becomes an open question.

Muslim law, on the other hand, is a title that refers to those aspects of the law that are understood by Muslims to be Islamic law. But this understanding is not and cannot be uniform as Islamic law does not have a static, fixed content, since it is extrapolated from a range of sources by different juristic schools of thought in Islam. Broadly, these schools or *madhab* (plural *madahab*) as they are called, are Hanafi, Maliki, Shafii and Hanbali (among Sunni Muslims), and Athna-Ashariya, Zaidya and Ismailia schools among Shia Muslims. Implicitly, the term reflects interpretative variations within the Islamic legal tradition as well as contemporary law reform in the Muslim world. For instance Hanafi Muslims do not require an adult Muslim woman to have the consent of her male guardian to enter into a valid contract of marriage whereas followers of the Maliki tradition present it as a legal requirement. Similarly, legal

21. Kamali, *supra* note 3, at 2.



practice in Muslim communities concerning what they believe to be “Islamic” also varies. An example is the practice (among predominantly South Asian Muslims) of divorce by a husband through three pronouncements without any space for reconciliation (commonly known as “triple *talaq*”). Such practice is not considered Islamically legal by Shia Muslims. Despite this more realistic description of the Islamic legal tradition, few courses on the subject have adopted the title, Muslim law.<sup>22</sup>

Finally, we come to Islamic law—the most widely used title for courses on the subject in Muslim and non-Muslim jurisdictions. Such a title describes a course based on the substance and methodology derived from the primary and secondary sources, the general teachings of Islam, the *Shari’a* as principles of legally enforceable law, and contemporary legislation of Muslim jurisdictions derived thereof. Defined in these terms, Islamic law encompasses not only the theoretical framework of Islamic law, but also the various interpretations of these sources as well as legislative enactments. A course titled Islamic Law invites some criticism on the basis that the title creates the expectation of a uniform body of regulatory norms in statutory formulation, a position few scholars on the subject would be willing to support. Islamic Law must combine jurisprudence (*fiqh* and *usul-ul-fiqh*) and law as one leads to the other. Secondly, and more importantly, the law in Islamic Law should not be understood as the authoritative voice of black letter law conceptualised in western legal systems, and which the course title appears to denote.

In response to these observations, it is fair to note that courses based on the Islamic legal tradition invariably tend to include an element of contemporary legislation in Muslim jurisdictions based upon the *Qur’an*, *Hadith* as well as secondary and subsidiary sources of Islamic law. These courses thus present a combination of jurisprudence as well as its application and are not so far off the mark in the choice of title. The present paper uses Islamic law to define and describe scholarship derived from and based on principles of the Islamic legal tradition. I consciously use the term in order to include codification of these principles in contemporary Muslim jurisdictions.<sup>23</sup>

22. It is not within the scope of the present paper to interrogate why “Muslim law” does not find currency as a possible title, and it would require specific research to answer this question. I do believe that it is worth devoting time and thought to such an inquiry and an empirical study from a cross section of respondents across Muslim and non-Muslim jurisdictions may highlight some interesting responses. I raise this also as a pedagogical and methodological matter for teachers and students of the Islamic legal tradition.
23. My own module on the subject is entitled An Introduction to Islamic Law, arrived at after much thought and discussion with colleagues.

### Teaching Context and Methodology

For purposes of faculty in law schools, the critical question underpinning a course on Islamic law is: Does the fact that the sources of Islamic law are believed to be of divine origin affect the way the law should be taught?<sup>24</sup> If so, how might one approach the subject? Students often confuse the teaching of Islam as a religious doctrine with Islamic law, i.e., the principles and body of legal rules based upon it. Islamic doctrine and Islamic law are indeed different and this difference needs to be considered pedagogically. What is the impact of this difference on teaching and learning processes within the discipline? For instance, if we are to teach the subject as part of a religious studies curriculum, both content and delivery is likely to cover the origins, history and evolution of Islam and Muslims, with less emphasis on the law-making process in the Islamic legal tradition. On the other hand, when located in law and social sciences (the focus of the present paper), instructors must use divine, and divinely inspired sources, i.e., the *Qur'an* and *Hadith*, as sources of a legal tradition hence opening them to critical engagement and analysis. Most English language scholarship on Islamic law devotes less space and discussion to *usul-ul-fiqh* and more to the history of Islamic law. Faculty using these as textbooks reflect similar trends and approaches. It is suggested that course content on Islamic law include methodology (*usul*) for deriving concrete and relevant legal doctrines from the religious sources.

As a result, Islamic law teachers must always decide whether the course will be taught from a faith-based or a critical perspective. Ought we to adopt a different approach to teaching Islamic law on the basis that some of its sources are believed by Muslims to be the word of God from which no deviation is permitted? How far can the teaching and learning process in Islamic law critique these sources without breaking the boundaries of respect for religious text considered sacred and beyond debate by its adherents? Personally, I try to clarify these issues in the introductory session and make it clear that while in practice there is likely to be an overlap between what constitutes Islam, *Shari'a*, and Islamic law, my brief is to teach Islamic law.

Early in my experience teaching in non-Muslim jurisdictions, I learned to make very clear from the outset that this was an academic course on legal formulations inspired by the religion Islam as understood and developed by Muslim jurists and scholars over the centuries. It certainly has its particularities in that there is an inherent plurality within its jurisprudence lending itself to a variety of interpretations of the sources; hence the lack of uniformity of outcome in the form of laws derived thereof. But plurality within legal traditions is not confined to Islamic law, and the common law and civil law traditions also have multiple strains within their fabrics. I clarify the fact that I am not teaching a course on Islam as a religion, but I also acknowledge that no subject is taught in an ideological, social, or political vacuum. Thus teaching and learning Islamic law, like any other subject, is a political act and never

24. I acknowledge Prof. Cammack's assistance in sharpening the formulation of the questions posed.



devoid of moral, ethical, social and political context. I am of course stating the obvious but herein lies the difficulty of teaching a subject which draws upon what followers of Islam believe to be the word of God, divine and immutable and beyond reproach or question.

A further factor informing the instructor's approach and the students' expectations is where such a course or courses are housed. A cursory survey of existing courses on Islamic law in Muslim and non-Muslim western settings displays an uneven pattern. Courses offered in religious studies, theology or Islamic studies departments, and more likely to have Islamic Studies as a title, will be informed by the ethos and perspective of that discipline, and will have as their primary content the study of Islam as a religious tradition.

A minority of courses on Islamic law, located in social science or law faculties, engage with the subject from a legal and/or socio-legal perspective, drawing upon primary and secondary sources as well as contemporary state practice. Such courses tend to present a combination of doctrine and application, highlighting theory and practice within the Islamic legal tradition as well as efforts at law reform in Muslim jurisdictions.<sup>25</sup> Experiences informing the present paper are based upon courses housed in law schools in universities rather than institutions of Islamic studies and/or religious studies institutes imparting traditional Islamic education (in Muslim and non-Muslim settings).

### **Teaching Islamic Law in Diverse Settings**

Teaching Islamic law in a Muslim jurisdiction requires a different approach and methodology than one is able to adopt in non-Muslim jurisdictions. My teaching career in Pakistan, a predominantly Muslim country,<sup>26</sup> conditioned me to adopt a descriptive approach when teaching Islamic law and to refrain

25. In the United Kingdom, SOAS has one of the most established offerings on Islamic law. At the undergraduate level, it offers some Islamic law courses as part of the LLB honours program as well as BA programs. At the postgraduate level, an MA in Islamic law is planned. For details visit <http://www.soas.ac.uk/programmes/prog14037.php>. At Warwick University, a successful undergraduate module on Islamic law and postgraduate levels has been offered for a number of years and is one of the few offered outside the London colleges. For details, see [http://www2.warwick.ac.uk/fac/soc/law/ug/store/modules/islamic\\_law](http://www2.warwick.ac.uk/fac/soc/law/ug/store/modules/islamic_law). Other universities including University of East London (<http://www.uel.ac.uk/law/programs/undergraduate/LLBlaw.htm>) offer an Introduction to Islamic Law as part of the LLB honors program and offer a range of courses including Islam and Human Rights, Islamic Legal Cultures and Islamic Legal Theories as part of the postgraduate curriculum. Hull University too, offers modules on Islamic Law at the LLB level. For details, visit <http://www.courses.hull.ac.uk/modules/0708S2/22148.html> and <http://www.courses.hull.ac.uk/modules/0809S2/22163.html>. The Law School at Exeter University offers Islamic Law and Society as part of its offerings in the postgraduate program. For details, visit [http://www.huss.ex.ac.uk/postgrad/module\\_template.php?ModID=ARAM151&ayrc=2007/8](http://www.huss.ex.ac.uk/postgrad/module_template.php?ModID=ARAM151&ayrc=2007/8). This is not an exhaustive list but rather examples of the offerings on Islamic law in some United Kingdom universities. For details of courses on Islamic law in American law schools, see John Makdisi, A Survey of AALS Law Schools Teaching Islamic Law 55 *J. Legal Educ.* 583-585 (2005).

26. I taught at the University of Peshawar, Pakistan for twenty-five years.

from critiquing existing scholarship and textbooks. That is how I recollect being taught in the mid-1970s as a law student at the University of Peshawar, and that was my expectation as a student. Critical engagement, analysis, and discussion were simply beyond the pale unless one wanted to stir up trouble or acquire the label of infidel. Textbooks on Islamic law authored by highly reputable scholars (including D. F. Mulla<sup>27</sup> and Abdur Rahim<sup>28</sup>) contain critical analysis on various aspects of Islamic law. Yet academics, including myself, navigated around points of contention between various schools of thought in order to avoid the need for independent thinking and critique.<sup>29</sup> Of the three questions for analysis, the what, why, and how, lecturers would stop at what (descriptive/informative level of understanding concepts), and not venture further to interrogate why and how a certain principle of law was derived. This approach encouraged rote learning to the exclusion of questioning, debating, and arriving at an autonomous position.<sup>30</sup> Criticism was considered an effort to undermine Islam itself and was a risky undertaking fraught with danger of the gravest kind, including being accused of blasphemy.

A more compelling reason for not engaging rigorously with source materials in Muslim jurisdictions is an underlying tension between the scholarly and interpretative authority of the traditional Muslim scholar and a legal academic in a law school.<sup>31</sup> Legal academics in western style universities are rarely accepted as interpretative authorities of the Islamic legal tradition due to their real or perceived lack of knowledge of Arabic and classical Islamic jurisprudence (*usul-ul-fiqh*). The general public perception of faculty in public sector law schools

27. D. F. Mulla's *Principles of Muhammadan Law* (M. A. Mannan, ed., PLD Publishers 1995).

28. Rahim, *supra* note 3.

29. I periodically rebelled but was restrained under the able guidance of my senior professors who always had my best interests at heart. One incident remains in my memory after more than three decades: I was disturbed by gaps in historical and jurisprudential accounts of factors leading to establishment of the Sunni and Shia sects in Islam and the resultant diverging views on legal principles and law. My research led me to believe that this was a political rather than a religious/spiritual schism and asked why certain landmark events including the case of Fatima, the daughter of the Prophet Muhammad demanding her inheritance from the first caliph Abu Bakr, had been blocked from Sunni Muslim memory. My senior colleagues saved me from stirring up inter-sect violence and advised me to turn my attention to something less controversial. Another time I posed the question of how two persons involved in unlawful sexual relations could marry each other when their punishment was stoning to death? Or, how could *mahr* (dower) be described as a gift and mark of respect to the wife by the husband at the time of marriage when it was returnable if the wife sought release from the marital tie?

30. Lectures were the main method of teaching and case law was rarely referred to. What I found deeply disturbing however, were textbooks on criminal law, including the Pakistan Penal Code and the Hudood laws, supposedly based upon principles of the Islamic legal tradition. The commentary and tone of the commentator/author was anything but gender sensitive.

31. The exception to this would be an Islamic law teacher at an Islamic university or *Shari'a* faculty.

in Muslim jurisdictions is that they are lawyers not *faqih* (jurist); neither are they *mufti* (a person qualified to give *fatwa* or opinion). This perception may also be due to the fact that the colonial era “secularised” the legal academy by creating law schools within universities where a law degree was a prerequisite to entering the legal profession.<sup>32</sup> Islamic law and jurisprudence was treated as one of many other courses and little attention was paid to developing research and methodological skills in this field. Concurrently this led to an undermining of the traditional institution of Islamic legal scholarship, the *madrassa*. A legal academic in most Muslim jurisdictions is thus restricted to lecturing from textbooks. Historically, the process whereby colonizers, occupying Muslim lands, replaced native laws (including Islamic law) with European ones is a well-documented, complex narrative. Ebrahim Moosa, for instance, recounts encounters between colonial and Islamic law.<sup>33</sup> Similarly, the legal historian John Strawson presents incisive commentaries on how renowned western Islamic law scholars contributed to undermining Islamic law as part of the “civilizing” mission of colonizers.<sup>34</sup>

These experiences are shared by Ayesha Shahid and Mamman Lawan, my colleagues at Warwick University. Narrating experiences of his time as a law lecturer in Nigeria, Lawan<sup>35</sup> stated that:

In Nigerian universities, the literature used is basically translations of the *Qur'an* and *Hadith* (teachings) of Prophet Mohammed, textbooks and articles mostly written by Arab, Asian or Nigerian Muslims a common feature of which is that they represent the classical point of view. They are descriptive. They give you the law as it is; they tell you that it has been made for you to obey; and they warn you that obedience is in your own interest both in this life and the life hereafter. In other words, teaching is based on the Islamic view of adherence to law as a form of worship rewarded in life after death. The law is regarded as either directly divine (when sourced from the *Qur'an* or *Hadith*) or it derives its authority from the divine sources (when formulated through secondary sources such as the views of Muslim jurists) and therefore must

32. Fazlur Rahman, *supra* note 4; Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Univ. of Chicago Press 1982); *see also* Ebrahim Moosa, *Colonialism and Islamic Law*, in *Islam and Modernity: Key Issues and Debates* 158–81 (Muhammad Khalid Masud, Armando Salvatore & Martin van Bruinessen, eds., Edinburgh Univ. Press 2009).
33. Moosa, *supra* note 32, at 158.
34. John Strawson, *Encountering Islamic Law* (Univ. of East London School of Law Publications, Media and Exhibition No. 1 1993), *available at* <http://www.uel.ac.uk/law/research/publications/islamiclaw.htm>; John Strawson, *Islamic Law and English Texts*, 6 *Law and Critique* 21–38 (1995).
35. Dr. Mamman Lawan completed his doctoral studies at the Law School, University of Warwick in 2009. He has taught Islamic law at Bayero University, Kano, Nigeria for a number of years.

be obeyed as it is. It is simply a take-it-or-leave-it rule. Take two examples: Students are taught that theft attracts amputation of the arm as punishment once the conditions (such as custody and value) have been satisfied. Likewise, that men and women are equal save that due to the difference in their gender roles which is informed by their respective natures, men shall take twice the share of women in inheritance.<sup>36</sup>

In comparison, Mamman sums up his experience of teaching Islamic law in the United Kingdom as follows:

In the UK, the (Islamic law) literature takes a different approach. It looks at the classical position in a wider context. It questions the applicability of Islamic public law in modern times particularly in the face of international human rights treaties which Muslim countries clamouring for the law are party to. It says for instance that amputation of the arm and other capital punishments are incompatible with “universal” human rights standards. And they describe as “discriminatory” against women the unequal inheritance shares, something which the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) frowns at.

On a deeper level, you find further differences. In Nigerian universities for instance, the authority of the *Qur'an* and *Hadith* are unquestionable. In class, we boldly tell students that “the Holy *Qur'an* is the word of God, and the *Hadith* are the sayings, actions and approvals of the Prophet.” But in the UK, the practice is to say “the *Koran* is believed by Muslims to be the word of God, and *Hadith* is the sayings, actions and approvals credited to Mohammed.” I even came across literature which challenges the *Hadith*. For instance, a German scholar, Ignaz Goldziher, argues that the *Hadith* is not a reliable source of law because, according to him, it is the record of the views of early Muslims and not the teachings of the Prophet or even his companions; it is oral; later collections are larger than earlier ones; etc.<sup>37</sup> In Nigeria, such literature cannot find its way into school curriculum.

It is not only the literature that is challenging. The students, some of whom are atheists or agnostics, asked questions on fundamental theological/legal issues which would hardly be asked in Nigeria. For instance, a student once asked me, “Does your God know the past, the present and the future?” to which, being Muslim, I replied, “Yes, He certainly does.” The student asked further: “Then why did He not provide for issues like human cloning in the Koran?” Notwithstanding the fact that the *Qur'an* was revealed more than 1,400 years ago and that human cloning is a new technology yet to come to fruition, this question could only be asked in western countries like the UK; to raise the same question in a country like Nigeria, is to challenge the wisdom of God.

36. Mamman Lawan, Contrasting Two Teaching Experiences, Brief Contributed to the Islamic Law Curriculum Development Project (May 2008). I am grateful for this contribution.

37. M.Z. Siddiqi, *Hadith Literature. Its Origin, Development and Special Features* (Islamic Texts Society 1993).

Ayesha Shahid<sup>38</sup> describes the approach she had to adopt when lecturing on Islamic law at the University of Peshawar, Pakistan and how it differed from her experience of teaching the subject in the United Kingdom.

As part of the teaching team for the Islamic family law module, what I have enjoyed most is the academic freedom in designing and teaching the curriculum.... If I compare the teaching method followed at Warwick with the method of teaching Islamic law in Pakistan I would say that there is a huge difference between the two (not so much in terms of contents or major topics) and definitely in terms of approach and teaching methodology. The course in Pakistan does not invoke a critical evaluation of the subject. Any questioning of the subject amounts to challenging religious law which is unacceptable to conservative Muslims. As a result the course fails to generate an analytical approach among students and lack of critique and analysis is clearly visible in lectures delivered.<sup>39</sup>

I too can report that teaching Islamic law in non-Muslim jurisdictions has been a more challenging, intellectually engaging and rewarding experience. Students, mindful of the fact that this law is informed by Islam, formulate critical questions in a respectful and mature fashion—something that a student in a Muslim jurisdiction would never contemplate. The curriculum as well as the teaching methods reflect this approach resulting in a fruitful intellectual exchange.

From a pedagogical perspective, I often adopt a comparative law approach when dealing with some issues in my Islamic law teaching. This arises due to the different normative frameworks on which the Islamic legal tradition and western legal systems are based. An important point is to give equal weight and emphasis to both. One of the most challenging and eye-opening comments I received in my feedback on the Islamic Law course at Warwick University, was the following:

The module was very interesting and I enjoyed the subject matter.... My key concern was that we weren't challenged to view the law from an Islamic viewpoint. Instead, we were seeing it from the western eye, which made it seem antiquated or even wrong.

This comment stunned me because I had never considered either the content or the delivery to reflect these views, but the student's comment rang alarm bells. On closer inspection, I realized that unconsciously, as western academics, we tend to use a western knowledge system, both in substance

38. Shahid is a lecturer at the Law School, University of Hull. She was previously a doctoral candidate and Islamic law tutor at the Law School, University of Warwick, and before that, a lecturer, Faculty of Law, University of Peshawar, Pakistan.

39. Ayesha Shahid, *Islamic Law Teaching, Brief* contributed to the Islamic Law Curriculum Development Project (May 2008). I am grateful for the contribution.

and procedure, as our reference point when teaching Islamic law. Thus, when engaging with concepts and institutions of family law, for instance, we consider monogamous marriage as the standard form while polygamous unions are considered freakish or immoral. The starting point in many textbooks as well as teaching sessions is the oft-repeated definition of marriage in *Hyde v. Hyde*, where marriage is stated to be the union of one man and one woman to the exclusion of all others. Islamic family law students from western jurisdictions therefore approach and judge polygamy from their moral, ethical standpoint and find it difficult to engage with discussion around the *Qur'anic* verses on the subject.

Consciously or unconsciously, we find ourselves trapped in an Orientalist discourse on Islamic law, its origins, and doctrine, wherein lies a constant positioning of legal norms vis-à-vis each other.<sup>40</sup> At best, in our conversations with students, we are trying to present Islamic laws as modern and progressive and not pre-modern and backward; hence the remark of my undergraduate tutee who picked up on this defensive comparative approach, discarding it as completely uncalled for.

In order to create a mutually beneficial discourse, one must consider the extent to which western scholarship has engaged with Muslim scholarship. Barring a few exceptions, knowledge of Muslim theorists, jurists and philosophers is rare in the western world. In the few cases where there has been an engagement with Islamic legal tradition, it has been through the eyes of a post enlightenment western liberal tradition as well as an Orientalist standpoint. For example, *Hadith* as a source of law has been of interest to western scholars of Islamic law for over 200 years. Siddiqi states that “[w]hile some have accepted the traditional canons of *Hadith* criticism developed by Muslim scholars themselves, others have offered alternative accounts of the subject.” Ignaz Goldziher, Alfred Guillame, Joseph Schacht and others attempt to discredit *Hadith* literature as a valid source of Islamic law by questioning its very foundation.<sup>41</sup> Dialogue between a comparative perspective of Islamic law and its western counterpart must be among equals. However, this type of meaningful discourse has been conspicuously absent.<sup>42</sup> As Edward Said remarks: “The essence of this tradition is to subject Islamic law to European

40. For an incisive analysis, see Wael B. Hallaq, *The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse*, 2 *UCLA J. Islamic & Near East Law* 1 (2002).

41. Mohammad Z. Siddiqi, *Hadith Literature: Its Origins, Development and Special Features* 124 (Islamic Texts Society 1993). For a concise summary of these authors' viewpoints, see *id.* at Appendix II, 124–35.

42. Shaheen Sardar Ali, *Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Reflections on an Evolving Methodology for Consensus in Religious Pluralism and Human Rights in Europe* 57–59, 61 (Titia Leonon & Jenny E Goldschmidt eds., Intersentia 2007).



intellectual judgement, by seizing the ‘superior location’ made available by European power.”<sup>43</sup>

Some suggested steps in teaching Islamic law include the following:

- First, clarify the difference between Islam (as a religion and faith), and Islamic law as a human articulation and endeavour, albeit informed by the Islamic religion. I adopt a “law in context” approach for which Warwick University Law School has always been well known in UK academia and beyond.<sup>44</sup> Since every verse of the *Qur’an* and every *Hadith* has a historical context, it is important to appreciate the context in order to understand, critique, and interrogate the law based on these sources. Further, while Muslims consider every word of the *Qur’an* as the word of God, the same cannot be said of every word of every *Hadith* or indeed the secondary sources of law, i.e., *ijma* and *qiyas* (or other juristic techniques including *ijtihad*, *taqlid*, *tafiq*, and *takhayyur*). Therefore, reading a primary source and a secondary source of Islamic law in their respective contexts is integral to its understanding of how a particular point of law was derived. I also make the point that there is no single monolithic version of what constitutes “true” Islamic law. There are many diverse interpretations. Equal legitimacy and acceptance must be accorded to the various sects (Sunni and Shia) as well as schools of juristic thought in Islam (Hanafi, Maliki, Shafii and Hanbali).
- As an application of the above principle, I use *Qur’anic* verses as the starting point for our discussion on a range of themes (e.g., marriage, dower, divorce, custody, guardianship, inheritance, succession). We then look at various codified laws in contemporary Muslim jurisdictions supposedly based on these verses of the *Qur’an*.
- Because the woman question is so central in any discussion on Islam and Islamic law, it is important to consciously adopt a gender-sensitive perspective throughout the course and in analyzing how various laws came about in the Islamic legal tradition.
- Assessments are also based on the methodology above. For instance, in a critique of laws on dissolution of marriage, *Qur’anic* verses are the starting point of our discussion. We then formulate possible drafts of legislation based on the *Qur’anic* verses and analyze existing legislation from various Muslim jurisdictions questioning the extent to which these match the *Qur’anic* verses on the subject.<sup>45</sup>

43. Edward Said, *Orientalism* (Vintage 1978).

44. The “law in context” approach meant that in order to understand the law, it was important to study it within its context including the social, political, economic, moral and ethical dimensions. It was differentiated from a black letter approach to which many law schools subscribed. In the 21st century however, things have moved on and most law schools believe themselves to be “contextual” in their approach to legal studies.

45. For detailed examples, see our teaching manual entitled *An Introduction to Islamic*

- We also explore the extent to which a principle of law is actually a religious injunction and the degree to which it is derived from culture, custom, and tradition of a given social context.
- Finally, a section of the course is devoted to exploring contemporary issues in Islamic law arising from technological and social developments affecting Muslims in a global environment. These themes and topics differ from year to year and include surrogacy and its implications and responses from within the Islamic legal tradition; presenting DNA evidence of parentage in a court of law; human milk banks and impact on rules of prohibited degrees of relationship in marriage among Muslims; minimum and maximum periods of gestation in order to establish paternity (and legitimacy).

### Why a “Law in Context” and Comparative Approach?

It is necessary for Islamic Law teaching to adopt a “law in context” approach where the meaning of law is understood and explored in its wider social, economic, political, ethical and moral sense and not confined to a reading of the text as a formal, written piece of legislation. Additionally, and more importantly, any question on Islamic law is open to more than one legal response and, barring a few exceptions, more than one set of laws may well be extrapolated from the same sources. The success of any course on Islamic law depends on a number of front-loaded inputs. For instance, the opening teaching sessions would be well spent on a concise overview of sources of the Islamic legal tradition against the backdrop of the Sunni-Shia schism and the evolution of the schools of juristic thought i.e., Hanafi, Maliki, Shafi’i, and Hanbali in the Sunni *madhab*, and Athna-Ashariya, Ismailia, and Zaidya in the Shia sect. An additional challenge in non-Muslim jurisdictions where the student population taking Islamic Law has no prior knowledge of or exposure to Arabic or Islam, is the need for a glossary of terms with English translation. I adopt the practice of writing every new Arabic word used in class on the board, reading it aloud and asking the class to repeat after me. One member of the class volunteers to make notes to develop our own little Arabic/English class dictionary which we revise before every class. It is inspiring to hear enthusiastic attempts at reading words in a foreign language reverberating in an otherwise all-English environment.

Any course on Islamic law must present a comprehensive history of the primary and secondary sources of what constitutes Islamic law as well as juristic techniques employed in the classical period of its evolution. Introducing students to traditional methodology of *usul-ul-fiqh* need not be done to the exclusion of illustrative examples of diverse interpretations of the same source. One of the initial class assignments could be as follows: How do we use the

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Family Law, available at <http://www.ukcle.ac.uk/resources/teaching-and-learning-strategies/islamiclaw/>.

*Qur'an* as a source on which to construct a law of evidence? After compiling relevant *Qur'anic* verses on the subject, the student takes into consideration the historical and cultural context of the verse and tries to determine the factors leading to a certain law on the subject. Further, it is important for the student to understand the principles of *naskh*, or abrogation, and its impact on law-making. The *Qur'an* was revealed over a period of almost twenty-three years and on more than one occasion, a later verse abrogated an earlier verse where a different law/regulation/injunction or exhortation was made. It is important to bear this in mind when developing a law based on a verse(s) of the *Qur'an*. Last, but not least, the student should engage the various interpretations of a particular set of verses by different schools of juristic thought as well as scholars belonging to Shia and Sunni sects.

Examples of divergent rules of law may be introduced early on in the course as well as through small group seminars and class assignments. For instance, Sunni schools of thought consider the triple *talaq* (divorce pronouncement) as reprehensible yet legally valid as opposed to the Shia sect that considers it non-binding and invalid.<sup>46</sup> What is the basis for arriving at such diametrically opposed conclusions, and how is this divergence explained in Islamic legal methodology?<sup>47</sup> Below are examples of possible case studies in an Islamic law course.

### Islamic Criminal Justice: Case Study 1

We might begin by sharing the genesis of Islamic criminal law on extramarital sexual relationships (*zina*), its definition, evidentiary rule, and punishment. Students are asked to follow all the relevant verses in the *Qur'an* and construct a legally enforceable rule and compare it with existing legislation in some Muslim countries. The *Qur'an* punishes extramarital sexual relations along a spectrum, from declaring such behavior a moral and legal transgression and punishable as *tazir* to making it a *hadd* offense triggering harsh mandatory punishments.<sup>48</sup> Verse 17:32 of the *Qur'an* prescribes thus: "And do not go near

46. *Talaq* means dissolution of marriage at the husband's initiative. In the Islamic legal tradition this dissolution has to follow certain procedures offering space for reconciliation. These modes of giving *talaq* (divorce) may either be the *ahsan* mode where one pronouncement follows abstinence from the wife for a specified period of time during which there is the opportunity for the couple to resume marital relations. Next is the *hasan* mode of divorce where the husband pronounces *talaq* thrice in three consecutive months without any sexual relations with his wife for the duration of this time. Here again there is an opportunity for resuming marital relations until the end of the third month. The triple *talaq* however is a summary *talaq* whereby the husband divorces his wife by three pronouncements in a single sitting with no room for reconciliation. This method is known as *bida* or innovation and is frowned upon yet considered legally acceptable.

47. Kecia Ali, *Women, Gender, and Islamic Law: Teaching About Classical Doctrine, Court Practice, and Contemporary Legal Reform*, available at [http://www.aarweb.org/meetings/Annual\\_Meeting/Past\\_and\\_Future\\_Meetings/2001/abstracts.asp](http://www.aarweb.org/meetings/Annual_Meeting/Past_and_Future_Meetings/2001/abstracts.asp).

48. Muhammed Selim El-Awa, *Punishment in Islamic Law* 15 (American Trust Publications

fornication (*zina*) as it is immoral and an evil way.” No particular punishment was prescribed at this stage.

Chapter 4 of the *Qur'an* entitled *An-Nisa* (Women) declares that, “If any of your women Are guilty of lewdness, Take the evidence of four (Reliable) witnesses from among you Against them; and if they testify, Confine them to houses until Death do claim them, Or Allah ordain them Some (other) way.”<sup>49</sup>

The students may read the above verses as applicable to *zina* where the prescribed punishment is imprisonment. This verse may also be termed as a precursor to the stricter *hadd* punishment.<sup>50</sup> But, as in other *Qur'anic* verses, there is space for atonement and forgiveness.

Chapter 24 of the *Qur'an* goes on to create the *hadd* offence of *zina* and prescribe punishment as follows:

The woman and the man Guilty of adultery or fornication, Flog each of them With a hundred stripes; Let not compassion move you In their case, in a matter Prescribed by Allah and the Last Day: And let a party Of the Believers Witness their punishment.... Let no man guilty of Adultery or fornication marry Any but a woman Similarly guilty, or an Unbeliever, Nor let any but such a man Or an unbeliever Marry such a woman: To the Believers such a thing Is forbidden.<sup>51</sup>

Here the students are likely to raise questions on how and why some contemporary Muslim jurisdictions prescribe stoning to death as punishment when none appears in the primary source, i.e., the *Qur'an*.

Finally, verses of the *Qur'an* relating to evidence may be incorporated into the discussion as well as the linkage between *qadhf* and *zina*. Another step is to link this case study with the *hadd* offence of *qadhf* or wrongful allegation testimony implicating a person for *zina*.

In this regard, students note that the *Qur'an* states:

And those who launch A charge against chaste women, And produce not four witnesses (To support their allegation), Flog them with eighty stripes; And reject their evidence Ever after: for such men Are wicked transgressors; Unless they repent thereafter And mend (their conduct): For Allah is Oft-Forgiving, Most Merciful. Those who slander chaste, indiscreet but believing women, are cursed in this life and in the hereafter: For them is grievous penalty. On the Day when their tongues, their hands, and their feet will bear witness against them as to their actions, on that day God will pay them back (all)

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1993).

49. *Qur'an* 4:15.

50. However, Abdullah Yusaf Ali in his commentary of the *Qur'an* makes the point that verse 4:15 addresses homosexuality and not *zina* between a male and female.

51. *Qur'an* 24:2-3.

their just dues, and they will realise that God is the (very) Truth, that makes all things manifest.<sup>52</sup>

A contextual analysis of the *Qur'anic* text raises the question of what brought about the harsh statement towards extramarital sexual activity and more so to allegations and insinuations thereof? The above verses were revealed following the famous "Affair of the Necklace" in which the Prophet Mohammad's wife Aisha was inadvertently left behind by a caravan in the desert as she went searching for her necklace that had gone missing. She was spotted by one of the young, single men in the Prophet's entourage and brought back to Medina leading to widespread rumours about her time alone with this man. The subsequent weeks turned into a nightmare for Aisha as her honor and dignity had come under question and she was suspected of inappropriate behaviour. The verse, therefore, unambiguously silenced rumors against not only Aisha but for future generations of women and proceeded to prescribe a very harsh punishment for a person or persons who attempt to slander a woman's good name.<sup>53</sup>

Read together and in light of the verses' context, it is evident that the focus of the pronouncements was to safeguard women's reputation and not spread rumors regarding extramarital relationships. In fact, the *Qur'an* advises people to walk away from a place where rumor mongering or impropriety (of behavior) is rife.<sup>54</sup>

A contextual reading of the primary sources of Islamic law thus provides a base upon which to build student skills for later parts of the course when we discuss legal reform in the Muslim world.<sup>55</sup> The case study also offers an opportunity to challenge the entire situation (offense and punishment) in the context of contemporary international human rights law.

52. *Qur'an* 24:4-5, 23-25.

53. See *Qur'an* 24:13-19 ("Why did they not bring Four witnesses to prove it? When they have not brought The witnesses, such men, In sight of Allah, (Stand forth) themselves as liars! Were it not for the grace And mercy of Allah on you, In this world and the Hereafter, A grievous penalty would have Seized you in that ye rushed Glibly into this affair. Behold, ye received it On your tongues, And said out of your mouths Things of which he had No knowledge; and ye thought It to be a light matter, While it was most serious In the sight of Allah. And why did ye not, When ye heard it, say—'It is not right of us To speak of this: Glory to Allah! This is A most serious slander!' Those who love (to see) Scandal published broadcast Among the Believers, will have A grievous Penalty in this life And in Hereafter: Allah Knows, and ye know not.").

54. *Qur'an* 24:16-17.

55. For this example, I have used my chapter entitled, Shaheen Sardar Ali, Interpretative Strategies for Women's Human Rights in a Plural Legal Framework: Exploring Judicial and State Responses to *Hudood* Laws in Pakistan, in Human Rights, Plural Legalities and Gendered Realities: Paths Are Made by Walking, at 381-406 (Anne Hellum, Shaheen Sardar Ali, Julie Stewart & Amy Tsanga eds., Weaver Press 2007).

### Gender-Sensitive Islamic Law Curriculum: Case Study 2

Women are and always have been at the center of the discourse in Islamic legal scholarship. This is true both within Muslim communities as well as in the non-Muslim world. I agree with Kecia Ali who states that Islamic law is a valuable resource to teach about women and gender in Islam.<sup>56</sup> For both detractors and proponents of Islam/Muslims, Islamic law becomes the barometer on which gender equality is measured. Again, the major challenge here is to differentiate between sources of Islamic law, in particular its primary sources, on the one hand, and the Islamic legal tradition on the other. Both are perceived as static and uniform, belying the dynamism and variation inherent in Islamic law. This flawed perception legitimates unequal gender relations and the inherent superiority of men. Thus, some *Qur'anic* verses are cited as markers of this inequality and generalized as an integral component of Islamic law. Examples include the evidentiary value of a woman's testimony, polygamy, physical chastisement of a wife by her husband, unilateral right of a Muslim husband to divorce his wife, and so on.

A gender sensitive approach to Islamic law challenges this worldview, arguing that the text on which discriminatory laws are based is open to more than one interpretation. Thus in discussing the verses of the *Qur'an* on polygamy, we attempt to adopt a holistic approach by also placing on the table as it were, the provisos that would require incorporation into any law allowing polygamy. Students are asked to consider the text on polygamy addressing the following questions:

- Is polygamy a mandatory religious obligation for a Muslim male?
- Is polygamy the rule or the exception in the *Qur'an*?
- If it is the exception, what are the precedent conditions to a polygamous marriage?
- How might these conditions form part of a law in the contemporary sense of the term?
- What if any or all of the conditions are not followed? What is the status of such a marriage: Is it valid, void or voidable?

Raising these issues opens up possibilities for legal debate and legislation more sensitive to women and challenges the oft-repeated views that the *Qur'an* accords a free hand to men for multiple marriages.

A further example of a gender sensitive approach to teaching Islamic law consists of expanding the discursive terrain of what constitutes law-making in the Islamic legal tradition. With the help of concrete examples, one can highlight the sterility of maintaining an inflexible attitude to the process of

56. Kecia Ali, *supra* note 47.



law making in Muslim jurisdictions as well as its application to Muslims in non-Muslim jurisdictions. In my teaching, I attempt to take students through a journey from *Shari'a* as principles of the Islamic legal tradition to *siyasa Shari'a*, or legislative enactments by the political authority of the state, and onwards to *qanun* or enforceable law, pointing out at various stages the distance from the divine and consequently the proximity of human intervention in the domain of law making. Law making is a human effort at interpreting and understanding the divine text and must be distinguished from the text, and subsequent generations of Muslim communities ought not to be held hostage to these time bound articulations.

There are many examples of that flexibility, most prominently those interpretations impacting women's rights.<sup>57</sup> Verse 2.282 of the *Qur'an* provides an example where pronouncements of arguably restricted application are used as justification for creating gender hierarchies within the Islamic tradition. We refer to the laws of evidence as an example where students are able to debate the contextual setting of the *Qur'anic* verses, relevant *hadith* on the subject, and its potential legislative formulations in contemporary times. A number of Muslim jurisdictions including Pakistan have legislated on the basis of Verse 2.282, thus legally reducing the status of women.<sup>58</sup> The verse states that the testimony of a woman is worth half that of a man in written financial transactions:

And get two witnesses,  
 Out of your own men,  
 And if there are not two men,  
 Then a man and two women,  
 Such as ye choose,  
 For witnesses,  
 So that if one of them errs,  
 The other can remind her.

57. For example in the area of *Hadd* laws supposedly derived from the *Qur'an*, see *id.*; Aasifa Quraishi, Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective, 18 Michigan J. Int'l Law 287-320 (1997); H R Kusha, The Sacred Law of Islam. A Case Study of Women's Treatment in the Islamic Republic of Iran's Criminal Justice System (Ashgate Pub. Ltd. 2002); Asma Jehangir & Hina Jilani, The Hudood Ordinances: A Divine Sanction? (Rohtas Books 1990).

58. Section 17 of the Qanoon-i-Shahadat Order, 1984.

Students are required to read views, opinions, and commentaries of scholars on the subject. Fazlur Rahman, for instance, believes that this verse is not stating any general law of the evidentiary value of male and female statements:

If the *Qur'an* did really regard a woman's evidence as half that of a man's, why should it not allow the evidence of four females to be equivalent to that of two males and why should it say that only one of the males may be replaced by two females? The intention of the *Qur'an* apparently was that since it is a question of financial transaction and since women usually do not deal with such matters or with business affairs in general, it would be better to have two women rather than one—if one had to have women—and that, if possible at all, one must have at least one male.<sup>59</sup>

Fazlur Rahman then goes on to state that one cannot simply deduce from Verse 2:282 a general law that under all circumstances and for all purposes, a woman's evidence is inferior to a man's. He is convinced that this verse does not at all prove any rational deficiency in women vis-à-vis men. As an example, he cites classical Islamic law which regards women with knowledge of gynecology as the most competent witnesses in cases involving gynecological issues.<sup>60</sup> Finally, he also suggests that even if a law could be formulated on the basis of such generalizations there is compelling reason to change the law when social circumstances change, such as when women and men are equally educated and conversant with business and financial transactions.<sup>61</sup>

Rahman's is a minority view and students often find it hard to find similar gender sensitive interpretations, posing a formidable challenge to developing a balanced Islamic law curriculum.

### Language/Competence of Non-Arabic Speaking Instructors

To what extent is English language scholarship adequately representative of the richness of the Islamic legal tradition? The answer is complex. Barring some honorable exceptions, the English-language scholarship is doctrinal and one discerns elements of what Said describes as Orientalism among some European writers on the subject. The well-known works of Ignaz Goldziher, Joseph Schacht, and others relating to *Hadith* as a source of Islamic law are examples of this trend that have only lately seen robust challenge.<sup>62</sup> Until recently, there were few non-western Islamic law scholars writing in English, so students drawing upon English language scholarship were mostly unaware of different aspects and perspectives to this debate.

Is a non-Muslim competent to teach Islamic law? I had not given this much thought until a couple of years ago when a colleague asked the question. I

59. Fazlur Rahman, *Status of Women in the Qur'an*, in *Women and Revolution in Iran* 42 (GuityNashat ed., Westview Press 1983).

60. *Id.*

61. *Id.*

62. This challenge has been mounted by, among others, Wael B. Hallaq, *supra* note 40.

responded that Islamic law is part of legal scholarship and so long as the tutor is competent to teach the subject, the question of religious belief ought not to apply. Is knowledge of Arabic an essential pre-requisite for teaching and learning Islamic law due to the fact that the *Qur'an*, *Hadith*, and most of the legal scholarship is in Arabic? The answer is complex and inclusive. Ideally, the primary sources ought to be read and understood in the original language, yet following the spread of Islam, non-Arab Muslims (except for the few who learned the language) relied on translations of the *Qur'an* and *Ahadith*. This automatically produced various understandings of the more complex aspects of the law. Although not explicitly stated, an on-going debate exists among scholars and the laity as to whether a hierarchy of knowledge had been created by virtue of the language in which it is generated. Some Islamic law scholars believe that the highest form of knowledge is generated by Arabic speaking scholars and a lower one by those who access it through translations. Thus, some Arab speaking Muslim scholars applauded the contemporariness of the *Qur'an* and Arabic "...because the categories of grammar, lexicography, syntax and redaction of the *Qur'anic* text, and those of Arabic consciousness embedded in the Arabic language have not changed through the centuries. This phenomenon is indeed unique..."<sup>63</sup>

Others, including An-Naim, remind us that "The *Qur'an* was revealed in Arabic, which is a human language that evolved in its own specific historical context, and many verses of the *Qur'an* were addressing specific situations in the daily lives of early Muslims at that time (610-632 CE) in their local context of western Arabia."<sup>64</sup> This suggests that knowledge of Arabic does not necessarily imply superior understanding of the *Qur'anic* text.

While the primacy of Arabic in Islamic law scholarship can be debated, it is evident that understanding the *Qur'an* and *Hadith* from the Arabic text or through translations by a diverse community of Muslims around the world has implications for the teaching and learning of Islamic law in English speaking and non-Arab Muslim jurisdictions. Teaching Islamic law from translated material means that one must, in the interest of objectivity, include a range of translations. Which one is more faithful to the original text and how does one construct an argument for a particular rule of law based on the *Qur'an* and *Hadith*? I would argue however that, even if one were teaching from the original Arabic text, that too would be susceptible to more than one meaning. After all, English (or French or German) legal texts may similarly be debated and different variants of interpretations derived.

63. I. R. Al-Faruqi, *Islam and Other Faiths*, in *The Challenge of Islam* 85 (Altaf Gauhar ed., Islamic Council of Europe 1978).

64. Abdullahi Ahmed An-Naim, *Global Citizenship and Human Rights: From Muslims in Europe to European Muslims* 11 (Intersentia 2006) (inaugural address as professor to the W.G. Wiarda Chair, Utrecht University).

### Challenges and Issues and the Way Forward

The restrictive approach towards Islamic law due to its source in divine texts spills over into the teaching of Islamic law in non-Muslim jurisdictions but from a different perspective. Popular understandings of Islam and Islamic law as doctrinal, fossilized, and backward looking tend to be the prism through which Islamic legal scholarship in English is read, understood and contextualized. A number of responses may help dispel these notions. For instance, an Islamic Law course is not like western courses in contracts, trusts or banking law and so on, because Islamic law is not statute law and thus has no single definitive content. Teaching Islamic law thus means teaching a range of possible rules on a particular topic based on the interpretation of those rules employed to resolve problems arising in various spheres of life. Although in recent years, codification of some areas of Islamic law has occurred, the vast corpus of Islamic law continues to be taught and applied as “principles of law” rather than “the law.” The method Muslim jurisdictions use to apply Islamic law principles, rather than statutes, and the mechanism by which a jurist arrives at a particular understanding of law, needs wider publication.

Students also need exposure to a broader Islamic law curriculum. I have often worried about the exclusion of Islamic court procedures and experiences in the curriculum, but some scholars have begun to fill this gap including Tucker’s<sup>65</sup> meticulous collection of *qadi* courts during the Ottoman period, Moors’s<sup>66</sup> and Welchman’s<sup>67</sup> work on women and property rights in Palestine, and Shahram’s<sup>68</sup> and Sonbol’s<sup>69</sup> work on family courts in the Middle East. These records show Islamic law in action and are fascinating examples of how women in particular articulated and obtained their rights through courts by using Islamic law.

A further initiative might be to obtain and translate, from both Muslim and non-Muslim countries, actual examples of marriage contracts with stipulations made by women, be it for dower amounts, place of residence after marriage, restricting the husband’s power to pronounce *talaq*, and so on. I believe this primary source documentation of Islamic law in action would breathe life into a mundane reading of requirements of a valid marriage contract.

65. Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Univ. of Calif. Press 1998).
66. Annelies Moors, *Women, Property and Islam: Palestinian Experiences, 1920-1990* (Cambridge Univ. Press 1995).
67. Lyn Welchman, *The Development of Islamic Family Law in the Legal System of Jordan*, 37 *Int’l and Comp. L. Q.* 868-86 (1988).
68. Ron Shahram, *Family and the Courts in Modern Egypt: A Study Based on Decisions by the Shari’a Courts, 1900-1955* (Brill Academic Pub. 1997).
69. *Women, The Family and Divorce Laws in Islamic History* (Amera El Azhary Sonbol ed., Syracuse Univ. Press 1996).

English language scholarship is increasing at a commendable pace, yet far more work is required to enhance existing offerings. More importantly, broader use of translated materials from various languages would better represent the diversity of the Islamic legal tradition.

Another challenge is to develop high quality teaching and learning resources in a range of Islamic law modules, not simply those confined to Muslim family law. Most institutions limit themselves to a family law course where there is abundant literature, and this passes as Islamic law in toto. The United Kingdom Council of Legal Education (UKCLE), the University of Warwick,<sup>70</sup> and the Commonwealth Legal Education Association through an Islamic Law Curriculum Development Project have developed a number of teaching manuals as well as a glossary of Arabic/English words and a bibliography. This is work in progress and we hope to expand and enrich these resources to encourage and support teachers of Islamic law globally.

There is an unmet need for a degree in Islamic law, as distinguished from Islamic studies, in western institutions of higher education. For instance, major financial institutions in a number of non-Muslim countries are now training their staff to do business with oil-producing Muslim jurisdictions, generating significant new interest in Islamic finance and banking law. As a consequence, related areas of Islamic law including family law, human rights, *Zakat*, social welfare law, criminal justice, and Islamic international law, to name a few, are also in significant demand in the west. In the present global political and social climate, where discomfort and distrust of Islam and Muslims is at an alarmingly high level, including Islamic law in the list of law school offerings would present an opportunity to engage firsthand with the Islamic legal tradition. For most law students in western universities, this would likely be their first and perhaps only interaction with Islamic law, or indeed Islam and Muslims, and a chance to dispel pre-conceived notions. I see this happening every time I walk into my Islamic law class. Islamic legal scholarship as a rigorous discipline may yet be the bridge where the “twain may meet” after all!

70. In the United Kingdom, I have had the privilege of leading this project and am happy to report that there is now an impressive collection of teaching materials on a range of Islamic law courses on the UKCLE website accessible to interested teachers, students and researchers.